

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

In the matter of the adoption of new rule
I pertaining to nutrient standards
variances

TRANSCRIPT OF THE PUBLIC HEARING

George Mathieus, Presiding Officer

Montana Department of Environmental Quality
Metcalf Building, Room 111
1520 East Sixth Avenue
Helena, Montana

March 24, 2014
10:04 a.m.

REPORTED BY:

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<p>1 WHEREUPON, the proceedings were had as follows:</p> <p>2 MR. MATHIEUS: Good morning again. This hearing</p> <p>3 is called to order. Let the record show that it is</p> <p>4 10:04 a.m. on March 24th, 2014. This hearing is taking</p> <p>5 place in Room 111 of the Metcalf Building in Helena,</p> <p>6 Montana.</p> <p>7 This is the time and place set for the rulemaking</p> <p>8 hearing in the matter of the proposed adoption of New</p> <p>9 Rule I, pertaining to numeric nutrient standards</p> <p>10 variances. My name is George Mathieus, M-A-T-H-I-E-U-S.</p> <p>11 I am the administrator of the Planning, Prevention, and</p> <p>12 Assistance Division of the Department of Environmental</p> <p>13 Quality, and I will preside over the hearing.</p> <p>14 Section 2-4-302(7), MCA, requires me to read the</p> <p>15 Notice of Function of the Administrative Rule Review</p> <p>16 Committee. It is as follows:</p> <p>17 Notice of Function of Administrative Rule Review</p> <p>18 Committee. Interim Committees and the Environmental</p> <p>19 Quality Council. Administrative rule review is a function</p> <p>20 of interim committees and the Environmental Quality</p> <p>21 Council, EQC. These interim committees and the EQC have</p> <p>22 administrative rule review, program evaluation, and</p> <p>23 monitoring functions for the following executive branch</p> <p>24 agencies and the entities attached to the agencies for</p> <p>25 administrative purposes.</p> <p style="text-align: right;">3</p>	<p>1 These interim committees and the EQC have the</p> <p>2 authority to make recommendations to an agency regarding</p> <p>3 the adoption, amendment, or repeal of a rule or to request</p> <p>4 that the agency prepare a statement of the estimated</p> <p>5 economic impact of a proposal. They may also poll the</p> <p>6 members of the Legislature to determine if a proposed rule</p> <p>7 is consistent with the intent of the Legislature or,</p> <p>8 during a legislative session, introduce a bill repealing a</p> <p>9 rule, or directing an agency to adopt or amend a rule, or</p> <p>10 a Joint Resolution recommending that an agency adopt,</p> <p>11 amend, or repeal a rule.</p> <p>12 The interim committees and the EQC welcome comments</p> <p>13 and invite members of the public to appear before them or</p> <p>14 to send written statements in order to bring to their</p> <p>15 attention any difficulties with the existing or proposed</p> <p>16 rules. The mailing address is P.O. Box 201706, Helena,</p> <p>17 Montana 59620-1706.</p> <p>18 I am also advising everyone present today of the</p> <p>19 requirement in Montana law that agencies of state</p> <p>20 government create and maintain a list of persons who are</p> <p>21 interested in that agency's rulemaking proceedings. An</p> <p>22 agency's interested persons list must indicate the subject</p> <p>23 or subjects in which each person on the list is</p> <p>24 interested. Persons whose names are on the list will</p> <p>25 receive notice by mail of all agency rulemaking notices in</p> <p style="text-align: right;">5</p>
<p>1 Economic Affairs Interim Committee: Department of</p> <p>2 Agriculture, Department of Commerce, Department of Labor</p> <p>3 and Industry, Department of Livestock, Office of the State</p> <p>4 Auditor and Insurance Commissioner, and Office of Economic</p> <p>5 Development.</p> <p>6 Education and Local Government Interim Committee:</p> <p>7 State Board of Education, Board of Public Education, Board</p> <p>8 of Regents of Higher Education, and Office of Public</p> <p>9 Instruction.</p> <p>10 Children, Families, Health, and Human Services Interim</p> <p>11 Committee: Department of Public Health and Human</p> <p>12 Services.</p> <p>13 Law and Justice Interim Committee: Department of</p> <p>14 Corrections and Department of Justice.</p> <p>15 Energy and Telecommunications Interim Committee:</p> <p>16 Department of Public Service Regulation.</p> <p>17 Revenue and Transportation Interim Committee:</p> <p>18 Department of Revenue and Department of Transportation.</p> <p>19 State Administration and Veterans' Affairs Interim</p> <p>20 Committee: Department of Administration, Department of</p> <p>21 Military Affairs, and Office of the Secretary of State.</p> <p>22 Environmental Quality Council: Department of</p> <p>23 Environmental Quality, Department of Fish, Wildlife &</p> <p>24 Parks, and Department of Natural Resources and</p> <p>25 Conservation.</p> <p style="text-align: right;">4</p>	<p>1 the subjects indicated.</p> <p>2 Anyone here today who would like to have his or her</p> <p>3 name placed on the Department's and Board's interested</p> <p>4 persons list may do so by contacting me at the conclusion</p> <p>5 of today's hearing. There are copies here today of a</p> <p>6 document describing the Board's and the Department's</p> <p>7 rulemaking authority according to various bureaus within</p> <p>8 the Department. You may use that document to indicate</p> <p>9 which areas of rulemaking interest you so that the</p> <p>10 Department can notify you of future rulemaking hearings in</p> <p>11 that area.</p> <p>12 Notice of this hearing was published in the Montana</p> <p>13 Administrative Register, Notice No. 17-355 on</p> <p>14 February 13th, 2014. As required by ARM 1.3.311 of the</p> <p>15 Secretary of State's Model Rules, which have been adopted</p> <p>16 by the Board and the Department, I am required to</p> <p>17 summarize the major provisions of the hearing notice.</p> <p>18 Paragraph 3 of the hearing notice sets forth the text</p> <p>19 of proposed New Rule I and the legal authority and</p> <p>20 rationale for adoption of New Rule I. Because of the</p> <p>21 length of the proposed rule and rationale, I will not read</p> <p>22 them into record. In a moment, I will ask the department</p> <p>23 representative here today to present testimony containing</p> <p>24 the rationale for adoption of New Rule I and proposed</p> <p>25 Circular DEQ-12B, which is incorporated by reference in</p> <p style="text-align: right;">6</p>

<p>1 proposed New Rule I.</p> <p>2 Paragraph 4 describes how the public may obtain a copy</p> <p>3 of proposed DEQ-12B, which would be incorporated by</p> <p>4 reference in proposed New Rule I. A complete copy of the</p> <p>5 hearing notice and proposed Circular DEQ-12B will be</p> <p>6 included in the official record of this hearing and copies</p> <p>7 are available here today.</p> <p>8 Paragraph 5 of the hearing notice notifies the public</p> <p>9 that interested persons may submit their data, view, or</p> <p>10 arguments, either orally or in writing, at this hearing.</p> <p>11 The notice also indicated that individuals may submit</p> <p>12 written data, views, or arguments to the Department of</p> <p>13 Environmental Quality and the Board of Environmental</p> <p>14 Review no later than April 1, 2014. To be guaranteed</p> <p>15 consideration, mailed comments must be postmarked by that</p> <p>16 date.</p> <p>17 The order of presentation of testimony today will be</p> <p>18 as follows: I will ask the department representative to</p> <p>19 begin with testimony, providing the reasons for adoption</p> <p>20 of New Rule I and Circular DEQ-12B. We will then hear</p> <p>21 testimony of proponents, then we will hear testimony of</p> <p>22 opponents. We will hear the statements of anyone else</p> <p>23 wishing to be heard, and I will then ask for any written</p> <p>24 comments that any person who does not submit oral</p> <p>25 testimony may wish to provide.</p> <p style="text-align: right;">7</p>	<p>1 DR. SUPLEE: Good morning. My name is</p> <p>2 Michael Suplee. That's spelled S-U-P-L-E-E. I am with</p> <p>3 the Water Quality Standards Section of the Montana</p> <p>4 Department of Environmental Quality.</p> <p>5 State law at 75-5-313, MCA, requires the Department to</p> <p>6 adopt general variance treatment levels by May 31st, 2016,</p> <p>7 and to implement, in consultation with the Nutrient Work</p> <p>8 Group, individual variances when the base numeric nutrient</p> <p>9 standards are adopted by the Board of Environmental</p> <p>10 Review. The Board is proposing the adoption of base</p> <p>11 numeric nutrient standards. The hearing for those is</p> <p>12 later today. Therefore, the Department is proposing the</p> <p>13 adoption of the variance procedures here. I'd like to</p> <p>14 touch on the science-based nature of the nutrient</p> <p>15 standards and the variance process.</p> <p>16 The river and stream nutrient standards that will be</p> <p>17 discussed later in the day have a scientific basis and are</p> <p>18 designed to protect beneficial water uses of the state's</p> <p>19 waters. This objective basis has resulted in criteria</p> <p>20 concentrations which are low in relation to commonly used</p> <p>21 wastewater treatment processes of today. In contrast,</p> <p>22 variances from the standards are for economic reasons</p> <p>23 related to the cost of wastewater treatment. But</p> <p>24 treatment technologies are evolving, as are innovative</p> <p>25 approaches to reusing treated wastewater, opportunities</p> <p style="text-align: right;">9</p>
<p>1 If you wish to present data, views, arguments, or</p> <p>2 other testimony, either orally or in writing, I'm</p> <p>3 requesting that you write your name and address on the</p> <p>4 sign-up sheets that are available on the back table and</p> <p>5 indicate whether you support or oppose this rulemaking on</p> <p>6 the sign-up sheet.</p> <p>7 This is an informational hearing, the purpose of which</p> <p>8 is to hear any and all relevant comments regarding the</p> <p>9 proposed amendments. Formal rules of evidence will not be</p> <p>10 observed, but testimony must be relevant to the matter at</p> <p>11 issue in this hearing. I will caution you that this is</p> <p>12 the hearing of the proposed numeric nutrient standards</p> <p>13 variance rule. Testimony regarding the adoption of</p> <p>14 numeric nutrient standards rules is not relevant to this</p> <p>15 hearing. That testimony must be submitted at the board</p> <p>16 hearing this afternoon at 2:00 p.m. in this room. If you</p> <p>17 cannot attend that hearing, you may submit written</p> <p>18 comments as provided in the notice until April 1, 2014.</p> <p>19 Since a court reporter is preparing a transcript of</p> <p>20 this hearing, all witnesses presenting oral testimony</p> <p>21 should move close to the microphone. Prior to making your</p> <p>22 statement, please identify yourself by name, address, and</p> <p>23 affiliation, if any.</p> <p>24 We will begin by hearing the comments of a</p> <p>25 representative of the Department.</p> <p style="text-align: right;">8</p>	<p>1 for nutrient trading, et cetera. The variance process</p> <p>2 over the next 20 years is necessary because it allows time</p> <p>3 for these and other nutrient reduction strategies to</p> <p>4 mature and become more cost-effective. Significant</p> <p>5 outreach to affected stakeholders, via the meetings of the</p> <p>6 Nutrient Work Group over the last five-plus years, has</p> <p>7 assured that the implementation process via variances is</p> <p>8 workable.</p> <p>9 Two economic studies have been completed which</p> <p>10 evaluated the potential costs to municipalities and other</p> <p>11 dischargers if the proposed standards had to have been met</p> <p>12 immediately. These studies show that affected Montanans</p> <p>13 would have borne substantial and widespread economic</p> <p>14 impacts if the standards were to have been met by 2012. I</p> <p>15 would like to submit for the Department's consideration</p> <p>16 two publications -- department publications: The first,</p> <p>17 "Demonstration of Substantial and Widespread Economic</p> <p>18 Impacts to Montana That Would Result if Base Numeric</p> <p>19 Nutrient Standards Had to be Met in 2011-2012"; and</p> <p>20 "Demonstration of Substantial and Widespread Economic</p> <p>21 Impacts to Montana That Would Result if Base Numeric</p> <p>22 Nutrient Standards Had to be Met by Entities in the</p> <p>23 Private Sector in 2011-2012." And here, the costs to have</p> <p>24 met the base numeric nutrient standards as of 2012 are</p> <p>25 evaluated.</p> <p style="text-align: right;">10</p>

<p>1 This process is a process by which we can</p> <p>2 progressively meet the standards over time. As noted, the</p> <p>3 Department expects new and improving technologies in</p> <p>4 combination with trading, alternative effluent management</p> <p>5 methods, non-point source best management practices,</p> <p>6 et cetera, to drive down nutrient reduction costs and make</p> <p>7 achieving the nutrient standards feasible. This will not</p> <p>8 happen overnight. The variance period is, therefore, for</p> <p>9 up to 20 years. 20 years also corresponds to the typical</p> <p>10 financing period and lifespan of a wastewater facility.</p> <p>11 New Rule I defines procedures the Department will use</p> <p>12 to implement variances after the base numeric nutrient</p> <p>13 standards are adopted. These rules reflect statute at</p> <p>14 75-5-313, MCA, but are presented in a more orderly fashion</p> <p>15 and are necessary to address details of the variance</p> <p>16 process. For example, the general variance treatment</p> <p>17 levels found in Department Circular DEQ-12B -- among those</p> <p>18 is, for example, the 1 milligram total phosphorous per</p> <p>19 liter and 10 milligrams total nitrogen per liter</p> <p>20 requirement -- expire in July 2017. This has been</p> <p>21 included to implement the statutory requirement that the</p> <p>22 Department review the treatment levels every three years.</p> <p>23 The Department will review and assess treatment</p> <p>24 technologies after June 1st, 2016, and may extend the</p> <p>25 current treatment levels or modify and extend them.</p> <p style="text-align: right;">11</p>	<p>1 proposed nutrient rules, but also all the circulars that</p> <p>2 are attached. Everything is required to work together to</p> <p>3 ensure that all of the discussions and agreements that</p> <p>4 have occurred between the Nutrient Work Group, the</p> <p>5 community industry, and the League and DEQ are all brought</p> <p>6 forward together. They work as a package. As Mr. Suplee</p> <p>7 said, it does take time; the variances are required for us</p> <p>8 to move forward.</p> <p>9 One of the things that the League has expressed</p> <p>10 concern with, and still has some concern, is that, as</p> <p>11 Mr. Suplee said, the numeric standards that are proposed</p> <p>12 are not achievable today. The phosphorous limits could be</p> <p>13 achieved with a significant investment, but the nitrogen</p> <p>14 levels of .3 milligrams per liter are not achievable with</p> <p>15 current and foreseeable technology. Even using reverse</p> <p>16 osmosis and a membrane plant, you would only be able to</p> <p>17 get to 1 milligram per liter of total nitrogen. So we do</p> <p>18 wish to still express that we are moving forward with</p> <p>19 standards that will require, for a long time, a variance</p> <p>20 process to occur, and that's why we say they need to be</p> <p>21 put together.</p> <p>22 We do have a couple of areas that we would like to</p> <p>23 continue the discussions on, and it is my understanding</p> <p>24 that DEQ is more than open to continuing discussions</p> <p>25 between now and full implementation and possibly</p> <p style="text-align: right;">13</p>
<p>1 Finally, 75-5-313(5)(b), MCA, requires that the</p> <p>2 concentrations of the general variance categories be</p> <p>3 calculated as a monthly average. The definition for a</p> <p>4 monthly average, which is provided in Department Circular</p> <p>5 DEQ-12B, enables the Department to calculate an average</p> <p>6 monthly permit limit using EPA's Technical Support</p> <p>7 Document, the TSD, which the Department now uses for all</p> <p>8 water-related permitting. Methods in the Technical</p> <p>9 Support Document used by the Department account for the</p> <p>10 variability in effluent.</p> <p>11 That completes my testimony. Thank you.</p> <p>12 MR. MATHIEUS: Thank you.</p> <p>13 Are there any proponents of this rulemaking who wish</p> <p>14 to testify? Proponents.</p> <p>15 MR. MUMFORD: Good morning. My name is</p> <p>16 David Mumford. I'm the public works director of the City</p> <p>17 of Billings, and I'm here to represent the Montana League</p> <p>18 of Cities and Towns. I'm kind of lonely up here.</p> <p>19 Montana League of Cities and Towns would like to thank</p> <p>20 everyone, the Department, the Nutrient Work Group, EPA and</p> <p>21 everyone. It has been a very long and at times</p> <p>22 frustrating process, but we have worked through it, and I</p> <p>23 think we've come to a lot of positive movement.</p> <p>24 The League does want to stipulate that in supporting</p> <p>25 this, everything needs to move forward, not only the</p> <p style="text-align: right;">12</p>	<p>1 afterwards. One is the area of the new standards that</p> <p>2 discuss protection of downstream use. There is still some</p> <p>3 clarification for future on how far that is. We</p> <p>4 understand what it is, but some of the things still need</p> <p>5 to be clarified, and that's just working out with EPA and</p> <p>6 DEQ some minor issues.</p> <p>7 The League would like to still work with DEQ -- it</p> <p>8 will take time, we understand that, but we would like to</p> <p>9 still continue discussions on setting standards for</p> <p>10 non-point source dischargers. Right now, all of the</p> <p>11 standards are based around point source dischargers, and</p> <p>12 we would like to sometime bring forward, with the State,</p> <p>13 legislation that would address non-point source, which is</p> <p>14 a huge contributor, especially in certain drainage areas.</p> <p>15 The last one is the significance of impact. As we</p> <p>16 move forward with the variance process, there is an area</p> <p>17 which we would like to continue. It is in the variance</p> <p>18 process now, but we'd like to have more clarifications as</p> <p>19 we move forward in the future, and that is: At what point</p> <p>20 is the investment making such minimal change to the water</p> <p>21 quality due to other impacts, such as non-point source,</p> <p>22 that the investment is not actually improving water</p> <p>23 quality? That area is something in there, but we would</p> <p>24 like to continue discussions.</p> <p>25 In conclusion, I'd like to thank the Department, EPA,</p> <p style="text-align: right;">14</p>

<p>1 the Nutrient Work Group, and all the others that have</p> <p>2 worked very diligently over a lot of years to accomplish</p> <p>3 this. And we understand and agree that these standards</p> <p>4 are needed to ensure that Montana has clean water into the</p> <p>5 future for all generations.</p> <p>6 Thank you.</p> <p>7 MR. MATHIEUS: Further proponents?</p> <p>8 (No response.)</p> <p>9 MR. MATHIEUS: I'll ask again, any more</p> <p>10 proponents?</p> <p>11 (No response.)</p> <p>12 MR. MATHIEUS: Seeing none, are there any persons</p> <p>13 who oppose this rulemaking and wish to testify?</p> <p>14 Opponents.</p> <p>15 MR. GALT: Mr. Chairman, my name is Dave Galt.</p> <p>16 I'm the executive director of the Montana Petroleum</p> <p>17 Association. We've submitted written comments today as</p> <p>18 well, and I just handed those to George.</p> <p>19 MPA has served as a member of the Nutrient Working</p> <p>20 Group, which was created by the 2009 Legislature, since</p> <p>21 its inception. MPA has participated in Nutrient Working</p> <p>22 Group meetings and submitted two letters on behalf of MPA</p> <p>23 to the DEQ in 2012 and 2013 in response to earlier drafts</p> <p>24 and documents pertaining to this rulemaking. MPA has</p> <p>25 hired and retained counsel since the inception to</p> <p style="text-align: right;">15</p>	<p>1 Montana following the implementation of this rulemaking</p> <p>2 and the standards; it's unclear.</p> <p>3 We do know at MPA that it will be very difficult to</p> <p>4 meet the end-of-pipe standards required by the rule</p> <p>5 process -- by the rule package for a permittee to receive</p> <p>6 a general variance. That's no easy jump. We do know that</p> <p>7 we are guinea pigs in this experiment. Montana is among a</p> <p>8 small number of states which has studied and moved to</p> <p>9 adopt numeric nutrient standards for rivers and streams.</p> <p>10 Six months ago, a federal district judge noted: "The</p> <p>11 plaintiffs point out that states in the Mississippi River</p> <p>12 Basin have no numeric water quality standards for</p> <p>13 phosphorous in rivers or streams or for nitrogen in any</p> <p>14 waters. And most states do not attempt to limit nitrogen</p> <p>15 and phosphorous discharges in the NPDES permits." None of</p> <p>16 our neighbors have adopted numeric nutrient standards. It</p> <p>17 is uncontested that we will have numeric standards when</p> <p>18 the other states do not.</p> <p>19 We believe that the severability language that you've</p> <p>20 worked hard to put in place is still inadequate. DEQ</p> <p>21 proposes to add a section 2 to Administrative Rules of</p> <p>22 Montana 17.30.619 and a section 4 to Administrative Rules</p> <p>23 of Montana 17.30.715 as a non-severability clause. As the</p> <p>24 Department has explained in its comments accompanying the</p> <p>25 rule, authority for DEQ to issue a variance and a</p> <p style="text-align: right;">17</p>
<p>1 represent both MPA and myself in assistance with this</p> <p>2 rulemaking.</p> <p>3 In 2011, the Legislature concluded that substantial</p> <p>4 and widespread economic impacts would result if Montana</p> <p>5 law required immediate compliance with numeric standards</p> <p>6 because current cost-effective wastewater treatment</p> <p>7 technology does not exist to allow permittees to meet the</p> <p>8 numeric concentrations for nitrogen and phosphorous</p> <p>9 proposed by the new standards. Without the statutory</p> <p>10 authority of the Department to authorize variances over</p> <p>11 the next 20 years, and the mandatory application of</p> <p>12 general variances if certain conditions are met, MPA would</p> <p>13 have urged the Legislature to abandon the pursuit of</p> <p>14 numeric nutrient standards. MPA has asked, in our written</p> <p>15 comments, the Board and the DEQ to make changes to the</p> <p>16 rule package and ensure that the variance will work as the</p> <p>17 Legislature intended.</p> <p>18 I must note the fear of the unknown many in the</p> <p>19 regulated community, both municipalities and industrial</p> <p>20 operators with wastewater permits, have with this</p> <p>21 rulemaking. The economic implications of it are unknown.</p> <p>22 We simply do not know whether potential new employers will</p> <p>23 be deterred from starting a business in Montana. We do</p> <p>24 not know whether some existing businesses with discharge</p> <p>25 permits will find it impossible to continue to operate in</p> <p style="text-align: right;">16</p>	<p>1 permittee to operate without complying with the numeric</p> <p>2 standards pursuant to a variance is critical to the</p> <p>3 Legislature's action. If a court or the EPA does anything</p> <p>4 to nullify a variance authorized by DEQ, the intent behind</p> <p>5 the legislation would be gutted.</p> <p>6 MPA has worked closely with the Department, and we</p> <p>7 appreciate that, on the non-severability language and</p> <p>8 appreciates its work to include it in the proposed rule.</p> <p>9 Nonetheless, we ask the Board to modify the draft language</p> <p>10 because it does not go far enough.</p> <p>11 The general variance provision internalized in the</p> <p>12 rule to be promulgated by DEQ and amplified in DEQ-12B</p> <p>13 will have no effect if, after promulgation of the rule,</p> <p>14 EPA allows -- excuse me, EPA disallows a permit with a</p> <p>15 general variance for the reason that DEQ allowed the</p> <p>16 permittee to deviate from the numeric standards based upon</p> <p>17 the application of a general variance. The essence of</p> <p>18 this argument is this: The Legislature, without</p> <p>19 opposition from EPA, used mandatory language in Montana</p> <p>20 Code 7-3-313(5)(b) to require DEQ to incorporate general</p> <p>21 variances in permits if the permit applicant meets certain</p> <p>22 conditions. If EPA, in turn, refuses to allow a permit</p> <p>23 with a general variance to take effect as a result of the</p> <p>24 inclusion of the variance, the intent of the statute has</p> <p>25 been nullified with respect to the permittee.</p> <p style="text-align: right;">18</p>

<p>1 In such a circumstance, the rules should not continue 2 to bind the permittee. Therefore, MPA has provided BER 3 with text to amend the language employed by the DEQ in our 4 written comments. Without the addition of this language 5 to the rule, the rule will remain in force if EPA rejects 6 a permit with a general variance for a permittee because 7 EPA does not believe the permittee is entitled to a 8 variance.</p> <p>9 We have some other concerns in addition. We have two 10 concerns about an issue not addressed by the draft rules 11 and related documents. Neither the rules nor DEQ-12 12 address the scope of protection of downstream uses and 13 whether the Department will assert that a discharger has a 14 broader responsibility beyond the first location of 15 loading by another source, point source or non-point 16 source. Contributions from point source dischargers are 17 the only discharges addressed through the rules and the 18 circulars.</p> <p>19 Specific changes to the draft language of the rules 20 are necessary, we believe. In section 3 of the rule 21 before the BER and section 3 of the rule before the 22 Department, the draft reads, "In many cases, the 23 concentrations are below the limits of current wastewater 24 treatment technology, particularly for nitrogen." We 25 believe it should say, "For nearly all permittees, current</p> <p style="text-align: right;">19</p>	<p>1 would also be a written comment submission.</p> <p>2 Again, MPA and our counsel, Mr. Mercer, with Holland & 3 Hart, stand ready to assist in working with the DEQ. We 4 have been a part of this. We recognize your diligence and 5 your efforts, the efforts of all your staff, and we 6 appreciate that, and we'd like to take it a little bit 7 further.</p> <p>8 Thank you. That's the appendix. (Document handed to 9 presiding officer).</p> <p>10 MR. MATHIEUS: Additional opponents?</p> <p>11 MS. MARQUIS: Good morning, Mr. Mathieus. My 12 name is Victoria Marquis. I am an attorney with the 13 Crowley Fleck Firm out of Billings. I'm here today 14 representing Arch Coal and the Otter Creek Coal Project.</p> <p>15 Arch Coal has significant concerns that this proposed 16 rule will impact their permitting process that they've 17 already begun with the DEQ. Arch is currently doing a 18 comprehensive technical review of the proposed rule and 19 the proposed rule amendments. They'll be submitting 20 detailed written comments to you by April 1st. I just ask 21 that you carefully consider their comments.</p> <p>22 Essentially, their concern is that the proposed rules 23 add significant uncertainty to the permitting process. 24 Specific to the variance process, we've already heard 25 today that even the DEQ acknowledges that there is no</p> <p style="text-align: right;">21</p>
<p>1 wastewater treatment technology would not allow permittees 2 to meet the concentrations for nitrogen and phosphorous 3 without the technology being cost-prohibitive."</p> <p>4 MPA recommends that the Board modify the language in 5 all three sections to strike "nutrient standards variance 6 limits" and replace it with "the Department's authority to 7 grant variances from the numeric standards for 8 permittees."</p> <p>9 In section 3 of the DEQ rule, where the Department 10 explains the reason for the rule, the Department has 11 written that "the statute allows dischargers to be granted 12 variances from base numeric standards in those cases where 13 meeting the standards today would be an unreasonable 14 economic burden or technologically infeasible." This 15 should be rewritten to reflect that "the statute requires 16 DEQ to grant general variances from base numeric standards 17 in those cases where meeting the standards today would be 18 an unreasonable economic burden or technologically 19 infeasible and the permittee meets the end-of-pipe 20 treatment requirements in DEQ-12B."</p> <p>21 The definition in 12B is unclear regarding monthly and 22 annual averages. We have offered a proposed definition in 23 our written comment.</p> <p>24 We also have an appendix that we meant to put with the 25 comments. I forgot that today. I'll bring that. That</p> <p style="text-align: right;">20</p>	<p>1 technology available right now to meet the numeric 2 standards. We've seen that the general variance can 3 sometimes be a lofty standard for some industries, so that 4 leaves us with the individual variance process. And that 5 process has a pretty high bar to even get through the 6 door; you have to show substantial and widespread social 7 and economic impacts. Based on the EPA guidance, a lot of 8 that is based on loss of jobs in the medium household 9 income. I haven't seen any discussion about a loss of a 10 company's investments.</p> <p>11 We're also concerned that the individual variance 12 relies on aiming for the lowest effluent concentration 13 feasible based on achieving the highest attainable 14 condition within the water body. It's very complicated in 15 streams that either haven't gone through the TMDL process 16 or they're not listed as impaired already. We heard some 17 concerns about that in the question-and-answer session.</p> <p>18 If the stream is not listed as impaired, is it really 19 necessary for these stringent numeric standards to be met?</p> <p>20 An additional uncertainty was touched upon by 21 Mr. Galt. The variance can be good for up to 20 years, 22 but it goes through a review process every three years. 23 This is really a lot of uncertainty for projects that 24 require such a large investment and such long-term 25 planning and procedures by companies. It's not that a</p> <p style="text-align: right;">22</p>

<p>1 company is afraid of going through a process like that, 2 but it just adds an element of uncertainty that isn't 3 commensurate with the size of the project. 4 That concludes my comments. Thank you. 5 MR. MATHIEUS: Thank you. 6 More opponents? 7 MS. JOHNSON: Good morning, Mr. Chairman. For 8 the record, my name is Tammy Johnson, executive director 9 of the Montana Mining Association. The Montana Mining 10 Association is the trade association of mineral 11 developers, producers, refiners, and vendors in the state 12 of Montana. We are a major employer and taxpayer in the 13 state, and we believe that the continued viability and 14 growth of our members' operations are significant factors 15 in the economic health of our state and its citizens. 16 I assure you that my opposition is actually very 17 light. But when I argued with myself for the past week as 18 to whether I was fully on board with this, I decided that, 19 to be perfectly honest, you can't bring up problems and 20 still be fully supportive. But it is a very light 21 opposition. 22 We would like this package to come together, and we 23 very much want it to work, because in addition to being 24 mineral producers throughout the state, we also are 25 citizens of this state. Our producers, our employees,</p> <p style="text-align: right;">23</p>	<p>1 stand pretty firm in support of non-severability language 2 that is not ambiguous. The suggestion made by the Montana 3 Petroleum Association, we feel, is a good one. We're open 4 to discussions on that, but it simply can't be ambiguous. 5 If dischargers, current or future, are denied general 6 variances, we need to stop for a moment and figure this 7 out. Because without that, what we're going to face is a 8 regulatory moratorium on new businesses in the state of 9 Montana, and I don't believe that any of us want that, 10 including your agency. 11 The second issue that I'll speak to is the lack of 12 clarity as to the interplay of our non-degradation 13 statutes which apply to new and increased sources and the 14 numeric standards and the variance rulemaking. When we 15 look at this entire package together, we still lack a 16 little bit of clarity as to how that will all work 17 together. The DEQ staff has been willing to explore this 18 with our members, has indicated continuing willingness to 19 work with our individual members who may apply for a 20 discharge permit and others to investigate options. We 21 completely believe that together maybe we can work this 22 out. 23 We appreciate your commitment. We trust we'll be able 24 to arrive at a workable, lawful solution for our members 25 and others in this state, but we're not sure. I was kind</p> <p style="text-align: right;">25</p>
<p>1 almost all of them will live in one of the municipalities, 2 towns, et cetera. And we understand that our cities and 3 towns and our municipalities desperately need a variance 4 from these numeric standards or it's certainly going to be 5 so costly for all of us that it's going to be difficult. 6 So we recognize the big picture in this as well. 7 The Montana Mining Association supported Senate 8 Bill 367, the legislation that authorized this rulemaking 9 effort. And Senate Bill 367, in our opinion, was very 10 clear as to intent. In adopting the numeric nutrient 11 standards, it was recognized that there would be 12 substantial and widespread harm, and the variance -- the 13 general variance was intended to apply to all dischargers, 14 current dischargers and future dischargers. But over the 15 course of time since that legislation was passed, that has 16 been questioned a time or two, enough to make us wonder 17 with any certainty whether or not that is how it is going 18 to be applied and whether or not that is going to be 19 legally challenged or challenged by the EPA. 20 If future or current dischargers are challenged or 21 denied by the EPA or through litigation, then there has 22 got to be a way to bring this process back to more or less 23 a full stop. We can't leave the numeric standards on the 24 books and have an unviable process in terms of the 25 granting of variances. For that reason, we -- We also</p> <p style="text-align: right;">24</p>	<p>1 of hoping, rather than being a proponent or an opponent, 2 you had a box here for hope and trust, because that's 3 really kind of where we find ourselves. We recognize the 4 need for this, but there are still outstanding issues. 5 And as Mr. Galt also stated, we want to remain 6 positive about this process, but, admittedly, our 7 neighbors, Idaho, the Dakotas, and Wyoming, have not 8 ventured down this path. And I suspect maybe they're 9 waiting to see how we do. Maybe we'll be absolutely 10 brilliant and we'll provide the exact right model for them 11 and they will be adopting and carrying forth exactly as 12 Montana is. But one thing is for certain: Our neighbors 13 do not have numeric standards adopted now; we do. It's 14 going to be difficult to gauge, but we also don't want to 15 see companies making a decision not to locate here or 16 perhaps to leave the state because of a process that 17 becomes unworkable. 18 Again, very light opposition. If I had firm solutions 19 to these problems, I would provide them. I typically 20 don't like to state a problem without offering a solution. 21 I know they're difficult to come by. And I appreciate all 22 your time and effort in working with us and your patience 23 in allowing us to ask questions and answer them. 24 We will be submitting written comments to the Board 25 and the DEQ prior to the April 1st deadline. I'd like to</p> <p style="text-align: right;">26</p>

<p>1 thank you very much for your time, your service, and your 2 deliberations. 3 Thank you. 4 MR. MATHIEUS: Are there additional opponents? 5 (No response.) 6 MR. MATHIEUS: Additional opponents? 7 (No response.) 8 MR. MATHIEUS: Seeing none, are other persons 9 present who wish to testify? 10 MAYOR SHELL: Yes, good morning. My name is 11 James Shell; address, Box 1170, East Helena. I was 12 recently elected as the mayor of the City of East Helena. 13 Although I cannot speak in opposition or support of 14 these specific regulations, I strongly support the actions 15 by the Board of Environmental Review and the DEQ to reduce 16 the economic burden on Montana citizens. 17 Additionally, I'd like to encourage any actions by the 18 BER and the DEQ to assist in working with local 19 municipalities to explain existing and potential new 20 regulations such as this. 21 Thank you for your time. 22 MR. MATHIEUS: Are there additional people who 23 wish to testify? 24 JOHN WILSON: Good morning, Mr. Chairman. My 25 name is John Wilson. I am representing the City of</p> <p style="text-align: right;">27</p>	<p>1 the rules. 2 You know, to me, it all comes down to cost. I think 3 that's -- There's a lot of technical issues, obviously, 4 that have been worked through; very important, very 5 challenging ones. But the thing that I come to all this 6 with is the impact to communities. It's just going to be 7 tremendous, even with the variance. And I think the 8 variance is an excellent step to try to ease that burden, 9 but, you know, 20 years is going to pass and it's always 10 going to be a huge challenge. 11 I don't have a change to recommend, but one thing I 12 just want to point out, and I've mentioned this before, is 13 one challenge in the variance process where we now have a 14 fairly lenient provision for lagoon systems. I think it 15 gets more stringent for mechanical systems as you go on. 16 The reality is, you know, we work in -- I love the concept 17 of silos; it describes it so well. But we're working on a 18 nutrient silo right now that doesn't include ammonia. And 19 when these lagoons, in the next couple of permit cycles or 20 the next permit cycle, get the ammonia requirement, those 21 that can't discharge directly or land discharge are going 22 to switch to mechanical plans. So there's going to be 23 some very, very small towns going into this mechanical 24 situation, mechanical variances, and big costs, and I'm 25 concerned how that's going to impact them.</p> <p style="text-align: right;">29</p>
<p>1 Whitefish. I am testifying -- I think I checked the 2 neutral box. I don't want that to be taken as 3 non-supportive, because, as you know, I've been involved 4 since the Affordability Advisory Group. And I certainly 5 appreciate all the work staff has done in DEQ and EPA, and 6 I very much want to thank everyone for that. 7 I just wanted to put a few things on the record that I 8 think are related to variances. It's really kind of hard 9 to separate things because everything is so 10 interconnected, but I'll try to stay close to variances. 11 And I don't expect to be nearly as articulate as the last 12 few speakers. 13 You know, working in local government, I accept that 14 there's some rules that are just tough to develop. And 15 this is, by far, the toughest I have ever seen. And in 16 Whitefish, we've been pretty progressive, and there's been 17 some rules that we just had to adopt, the city council; it 18 was time to move forward. Everybody had worked hard, 19 everybody knew there were things that could be improved, 20 but it was time to move forward. And I think that's what 21 we have here. And I just want to mention a few items for 22 the sake of being on the record. Essentially, it boils 23 down to the desire to continue working on several things. 24 It's also what I've seen in my hometown, and it's been a 25 good process to stay open to reconsideration and refining</p> <p style="text-align: right;">28</p>	<p>1 I hope, as we go forward, there could be some way to 2 look at the big picture and refine that. Because, to me, 3 this has always been about how to ease the shock for 4 communities; as well as the environmental benefits, but I 5 think there's enough people working on that. My bailiwick 6 has been the impact on communities. Just to digress one 7 bit on that: Obviously, it's expensive. But something I 8 think that everybody needs to consider in the big picture 9 is it's not just that some person is going to be 10 challenged to pay a \$100-a-month water bill, sewer bill. 11 It's when they've had enough, they're not going to approve 12 a bond issue to buy a new fire truck or they're not going 13 to vote for all kinds of other good things in the 14 community that cost money because they've just spent all 15 they can spend. And I think it's going to have wide-range 16 and indirect impacts, and I'm glad for as much as the 17 variance process can help that. 18 One or two other things. I agree with the comments 19 earlier about non-point sources. That's an old song, but 20 I think the best way to try to approach that is the 21 trading policy. I know that's not directly related here, 22 but I think we need to work on the trading policy, too, to 23 incentivize communities, more than I see the present 24 policy doing. Because that's one way we can get to some 25 point source/non-point source issues and make this more</p> <p style="text-align: right;">30</p>

<p>1 equitable.</p> <p>2 On the variance rules, and really on everything, but</p> <p>3 there's a huge need for outreach to the communities and to</p> <p>4 their consultants, because it's a confusing process.</p> <p>5 Aside from the fear of the unknowns, it's just going to</p> <p>6 be -- you know, communities are going to turn to their</p> <p>7 consultants to lead them through this process. And I</p> <p>8 really doubt that very many consultants understand the</p> <p>9 process right now, so I think there's a huge educational</p> <p>10 task out there that will make everything work better for,</p> <p>11 you know, the State, EPA, everyone.</p> <p>12 So I support moving forward with the rules as</p> <p>13 proposed, but I very much look forward to the opportunity</p> <p>14 to reconsider and refine these rules as time goes by. And</p> <p>15 I hope everybody is looking forward to that. And, again,</p> <p>16 I want to thank DEQ and EPA and everybody that's worked so</p> <p>17 hard on this.</p> <p>18 Thank you.</p> <p>19 MR. MATHIEUS: Thank you.</p> <p>20 Are there additional persons who wish to testify?</p> <p>21 MR. CAMP: I do, Mr. Chairman. My name is</p> <p>22 Randall Camp. I'm the public works director for the City</p> <p>23 of Helena. But I'm here to relate my experience in</p> <p>24 New Mexico as public works director for the Village of</p> <p>25 Ruidoso.</p> <p style="text-align: right;">31</p>	<p>1 The non-point source issue, there's been extensive</p> <p>2 testing on the Rio Ruidoso, both five years prior to the</p> <p>3 building of the plant and afterwards. We were putting out</p> <p>4 nearly drinking water quality effluent. Within a mile</p> <p>5 downstream, the water quality had to started to degrade</p> <p>6 because of non-point source through agricultural lands.</p> <p>7 My problem with numerical nutrient standards is one</p> <p>8 size does not fit all and it's arbitrary and capricious,</p> <p>9 to the point the concept of bioavailability is not</p> <p>10 considered in this argument. Sometimes in certain</p> <p>11 streams, 2 1/2 milligrams per liter on total nitrogen,</p> <p>12 you've already -- you're at bioavailability; the algae has</p> <p>13 no access to it, none of the biological processes have</p> <p>14 access to it. So establishing just a numerical standard</p> <p>15 that sounds good at this point in time when the science is</p> <p>16 undefined, unrefined. The Water Environment Federation is</p> <p>17 doing a lot of work on this right now, trying to give some</p> <p>18 guidance documents and some general guidance to U.S. EPA.</p> <p>19 I just think we're a little quick off the draw on this</p> <p>20 one. There's a lot of questions that need to be answered</p> <p>21 out there.</p> <p>22 I'm very happy for a variance process. In New Mexico,</p> <p>23 I would have really appreciated that, because we were</p> <p>24 required to attempt to meet the unattainable, and that</p> <p>25 caused a lot of consternation in a lot of circles, and we</p> <p style="text-align: right;">33</p>
<p>1 New Mexico implemented the nutrient standards on the</p> <p>2 Rio Ruidoso, and the town was required to build a</p> <p>3 \$40 million wastewater treatment plant for a town of</p> <p>4 10,000 people. It's 7,000 feet above sea level. It's a</p> <p>5 high-mountain stream. Several things weren't considered.</p> <p>6 It was a knee-jerk reaction in the regulatory world. So</p> <p>7 \$40 million later, the closest they can get on the</p> <p>8 nutrient standard is 3, with an MBR plant that's</p> <p>9 state-of-the-art. The only way they could push it any</p> <p>10 further is with a chemical addition that in itself would</p> <p>11 not pass a true environmental cost-benefit analysis.</p> <p>12 I am -- I wouldn't say neutral; I'm pro and con on</p> <p>13 this, and I'm very happy to see a variance process here,</p> <p>14 because there was no variance process in New Mexico. The</p> <p>15 standards almost -- well, almost destroyed the economy of</p> <p>16 the town for exactly the reason the gentleman who spoke</p> <p>17 before me said: All of the funding in the town was going</p> <p>18 to the wastewater treatment, so all other public services</p> <p>19 suffered because the money had to shift to the plant.</p> <p>20 Never mind the fact that it wasn't able to go to the sewer</p> <p>21 lines themselves, so leaky sewer lines weren't able to be</p> <p>22 repaired. The law of unintended consequences kicked in,</p> <p>23 so everybody stayed on the septic tanks rather than</p> <p>24 connecting to the city sewer, which that degraded the --</p> <p>25 continued the degradation of the stream.</p> <p style="text-align: right;">32</p>	<p>1 had to go back to EPA to get a permit. The plant became</p> <p>2 operational in April of 2011, and we renegotiated our</p> <p>3 permit last year on August 31st. It would have been an</p> <p>4 arbitrary 1 milligram per liter total nitrogen. Even with</p> <p>5 another \$30 million worth of RO, we still could not have</p> <p>6 attained that, and that was with a state-of-the-art MBR</p> <p>7 plant.</p> <p>8 The economic impacts have been huge on that town,</p> <p>9 because it has taken all the money for infrastructure of</p> <p>10 water and sewer and basically put in the wastewater</p> <p>11 treatment plant. Which the question of the environment</p> <p>12 comes up, because the plant is an energy hog compared to</p> <p>13 conventional treatment and requires a lot of chemicals</p> <p>14 that are environmentally damaging to pollute. So then you</p> <p>15 have to ask yourself the question, just what exactly did</p> <p>16 you attain and where.</p> <p>17 But I'm very happy that you do have a variance</p> <p>18 process. But the whole nutrient standards I believe are</p> <p>19 premature.</p> <p>20 Thank you.</p> <p>21 MR. MATHIEUS: Thank you.</p> <p>22 Are there additional persons who wish to testify?</p> <p>23 MS. BRICK: Good morning. Thanks for the</p> <p>24 opportunity to comment. My name is Christine Brick,</p> <p>25 B-R-I-C-K. I'm with Clark Fork Coalition out of Missoula,</p> <p style="text-align: right;">34</p>

1 Montana. And as a member of the Nutrient Work Group for
 2 the past several years, I'm pleased finally to be here
 3 with a nutrient rule package that's up for comment.

4 Overall, I do support the nutrient standards. I think
 5 with respect to the variance procedure, I'm a little like
 6 Ms. Johnson, I wish there were a hope and trust box that I
 7 could check. Because we are concerned, I think, and we
 8 will have more detailed comments, about both the standards
 9 and the variance procedure. I guess our concern is more
 10 along the lines of hoping that the variances actually work
 11 and that water quality improves.

12 We understand that variances of some sort are
 13 necessary to implement the standards, but we want to make
 14 sure that, in fact, we do see an overall improvement in
 15 water quality over time, over the 20 years. We believe
 16 that these standards are smart standards, they're not one
 17 size fits all; that's a good thing. And, you know, apart
 18 from that, I guess I would just say that, clearly, there
 19 are potential economic issues with implementing, you know,
 20 these standards, but we should also balance that with the
 21 economic issue of maintaining clean water in our state.
 22 Clearly, that's a big driver for jobs, for companies who
 23 want to move here, for people who want to live here.
 24 Having clean and, you know, pristine waters is a big part
 25 of what makes Montana Montana, and we hope that these

35

1 standards will help us maintain and improve our waters
 2 over time.

3 Thank you.

4 MR. MATHIEUS: Thank you.

5 Other additional people who wish to testify?

6 (No response.)

7 MR. MATHIEUS: Does anyone else wish to testify?

8 (No response.)

9 MR. MATHIEUS: Okay. Seeing none, is there any
 10 person who wishes to submit written comments?

11 (No response.)

12 MR. MATHIEUS: Okay. Thank you all for your
 13 attendance and testimony. You may submit additional
 14 comments in the manner described in the notice until
 15 Tuesday, April 1, of 2014. This hearing is now adjourned.

16 (The hearing was adjourned at 10:55 a.m.)

17 * * * * *

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COURT REPORTER'S CERTIFICATE

STATE OF MONTANA)
) ss.
COUNTY OF LEWIS AND CLARK)

I, CHERYL ROMSA, Court Reporter, residing in
Helena, Montana, do hereby certify:

That the foregoing proceedings were reported by me in shorthand and later transcribed into typewriting; and that the -36- pages contain a true record of the proceedings to the best of my ability.

DATED this 31st day of March, 2014.

s/Cheryl A. Romsa
CHERYL A. ROMSA